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In the Supreme Court of the United States

OCTOBER TERM, 1995

FEDERAL HOUSING PARTNERS IV, ET AL., PETITIONERS

v.

HENRY G. CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether "comparability studies" used by the Department of Housing and Urban Development to compute rents owed to landlords who provide federally subsidized housing were conducted in a manner violative of the landlords' right to due process of law.

2. Whether Section 801 of the Department of Housing and Urban Development Act of 1989, which resolved claims arising out of the past use of comparability studies, violates separation of powers principles.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 55 F.3d 362. The opinion of the district court (Pet. App. 22-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. Pet. App. 14. The petition for a writ of certiorari was filed on August 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1974, Congress created the "Section 8" housing program to subsidize private rental housing for low-income tenants. 42 U.S.C. 1437f (1988 & Supp. V 1993). Under the Section 8 program, the Department of Housing and Urban Development (HUD) and a participating landlord execute a Housing Assistance Payments contract, which establishes an initial rent for the project based on its "fair market rental" value. Tenants pay a portion of the rent based on their income and ability to pay, and HUD subsidizes the rest through "assistance payments" to the landlord. See 42 U.S.C. 1437f(c)(1) and (3) (1988 & Supp. V 1993). Rents are adjusted annually "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. 1437f(c)(2)(A). Prior to 1989, the statute provided that such adjustments "shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality and age in the same market area, as determined by the Secretary." 42 U.S.C. 1437f(c)(2)(C) (1988).

HUD housing contracts state that annual rent adjustments will be based on Automatic Annual Adjustment Factors (AAAFs) published in the Federal Register. See *Cisneros* v. *Alpine Ridge Group*, 113 S. Ct. 1898, 1900-1901 (1993). The contracts further provide, however, that "[n]otwithstanding any other provisions of this Contract, [rent] adjustments * * * shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by

the Government." *Id.* at 1901. In 1981 HUD began to conduct "comparability studies" in certain real estate markets where it suspected that AAAFs were resulting in rents that materially exceeded market rents. Those studies involved comparisons between rents in Section 8 buildings and unassisted rents in comparable apartment buildings, with the unassisted rents used to limit HUD payments under the Section 8 contracts. See Pet. App. 15; *Alpine Ridge Group*, 113 S. Ct. at 1901.

In response to litigation over the AAAFs and the comparability studies, Congress amended Section 8 in 1989. See Department of Housing and Urban Development Reform Act of 1989 (Reform Act), Pub. L. No. 101-235, § 801, 103 Stat. 2057 (codified at 42 U.S.C. 1437f note (Supp. V 1993)). Section 801 "provide[d] explicitly that HUD may limit automatic rent adjustments in the future through the use of independent comparability studies." *Alpine Ridge Group*, 113 S. Ct. at 1901. Congress also established a formula, however, to give landlords a portion of the adjustments they would have received if the agency had used AAAFs rather than comparability studies to calculate rent adjustments during the period prior to Section 801's enactment. *Ibid.* Section 801(a)(1) designated that formula as "the exclusive method" for resolving past Section 8 rent subsidy disputes. 103 Stat. 2058.

Landlords challenged the constitutionality of Section 801, contending that it violated the Due Process Clause by abrogating their vested contract right to annual rent increases based on AAAFs alone. In *Alpine Ridge Group*, this Court unanimously held that the plain language of the housing contracts pre-

cludes any claim of entitlement to rent adjustments based solely on AAAFs. This Court found that the housing contracts "clearly envision[ed]" a comparison between assisted and unassisted rents. 113 S. Ct. at 1904. The Court further found that the contracts "afford[] the Secretary sufficient discretion to design and implement comparability studies as a reasonable means of effectuating" the requirement that assisted and unassisted rents be compared. *Ibid.* The Court concluded: "Because we find that [the landlords] have no contract right to unobstructed formula-based rent adjustments, we have no occasion to consider whether § 801 of the Reform Act unconstitutionally abrogated such a right." *Id.* at 1905.

2. Petitioners, a group of Section 8 landlords, brought this class action to challenge HUD's use of comparability studies and the constitutionality of Section 801. Petitioners alleged that constitutional infirmities in the comparability studies caused petitioners' "presumptive" right to AAAFs to become vested, and that Section 801 unconstitutionally deprived them of that vested right. The magistrate judge concluded that under this Court's decision in *Alpine Ridge Group*, petitioners had no contractual right to AAAFs that would enable them to proceed with their due process challenge to Section 801 and the comparability studies. Pet. App. 23, 29-31. The district court adopted the magistrate judge's recommendation and dismissed the action. *Id.* at 23.

3. The court of appeals affirmed. Pet. App. 1-20. Relying on *Alpine Ridge Group*, the court held that "HUD's discretion to make rental comparisons and rent adjustments under the contracts prevented AAAFs from ever becoming a property right vested in

landlords whose rents were materially different from comparable unassisted units." Pet. App. 19. The court also held that petitioners' "attempt to cast doubt upon the studies does not entitle them to AAAFs, since the remedy for an improper study is simply a better study." *Ibid.* The court of appeals likewise rejected the argument that HUD's comparability studies had been conducted in a manner inconsistent with the Administrative Procedure Act (APA), holding that any failure to comply with the APA could not give rise to a property right to AAAFs. Pet. App. 19. The court of appeals also concluded that, even if the APA would otherwise be applicable, its provisions were superseded by Section 801's establishment of an "exclusive remedy" for disputes over comparability studies. *Id.* at 20.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The threshold issue in any due process challenge is whether the plaintiff can demonstrate a deprivation of life, liberty, or property. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 & n.3 (1985). In the present case, petitioners contend that "HUD's implementation of comparability studies in the 1980's without ascertainable nationwide standards for their implementation violated fundamental due process principles." Pet. 6. However, the HUD housing contracts expressly provide that rent adjustments "shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the

Government[.]" Pet. App. 15. Based on that contractual language, this Court held in *Cisneros* v. *Alpine Ridge Group*, 113 S. Ct. 1898, 1905 (1993), that landlords in petitioners' position "have no contract right to unobstructed formula-based rent adjustments." Relying on *Alpine Ridge Group*, the court of appeals correctly held that petitioners could show no deprivation of property, see Pet. App. 18-19, a holding fatal to petitioners' due process claim that they are entitled to full AAAFs.

Petitioners attempt to distinguish *Alpine Ridge Group* on the ground that their suit involves a challenge to the manner in which HUD's comparability studies have been conducted rather than a challenge to HUD's right to rely on such studies at all. See Pet. 6-7, 9. This Court in *Alpine Ridge Group* left open the possibility that landlords could challenge individual comparability studies, see 113 S. Ct. at 1904 & n.3, but it did not suggest that HUD's use of ad hoc comparability studies would effect a deprivation of property subject to procedural due process principles. See Pet. App. 19 ("We do not see how a failure to follow APA procedures could have given rise to a property right to AAAFs unqualified by comparable local rents.").

Finally, petitioners identify no decision holding that HUD has conducted its comparability studies in an unreasonable manner. Petitioners' claim therefore would not warrant this Court's review even if the agency's use of an unreasonable study were thought to implicate due process principles.

2. Petitioners contend that this Court should "provide review of the issue of whether Congress violated the separation of powers doctrine by legislating an

exclusive remedy for pending and potential litigation against HUD arising from HUD's misuse of comparability studies prior to the passage of Section 801." Pet. 9-10. That argument was not raised in or addressed by the courts below, and in any event it lacks merit.

a. Petitioners failed to raise this argument in the district court or the court of appeals, and neither of the courts below suggested that Section 801 raised separation of powers concerns. "As a court of review, not one of first view," *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. 2214, 2219 (1995), this Court "usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court," *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); see also *INS* v. *National Center For Immigrants' Rights*, 502 U.S. 183, 188 (1991); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). The Court will address a ground not raised below "only in exceptional cases." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989). Petitioners have given no reason for their failure to raise the separation of powers claim at an earlier stage of the litigation, nor have they identified any extraordinary circumstance warranting this Court's resolution of a question not raised or decided below.

b. In any event, petitioners' separation of powers argument is without merit. Petitioners contend that in enacting Section 801, "Congress * * * usurped the power of the judiciary by resolving all pending and future litigation against HUD based on the use of comparability studies and prescribing the exact outcome resolution and the exclusive remedy for any such disputes, thereby removing such disputes from

the proper jurisdiction of the federal courts on a case-by-case basis." Pet. 13-14. Petitioners rely on this Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Pet. 13-16.

Petitioners' reliance on *Klein* is misplaced. "Whatever the precise scope of *Klein*, * * * later decisions have made clear that its prohibition does not take hold when Congress amends applicable law." *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1452 (1995) (brackets and internal quotation marks omitted).* Section 801 did not direct that existing law be applied in a specified way to particular cases; rather, it altered the substantive standards governing the computation of rental payments owed to a broad class of Section 8 landlords. Cf. *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429, 437-441 (1992). Petitioners' separation of powers claim is therefore without merit.

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* The "exclusive method" established by Section 801(a) for resolving disputes over comparability studies does not apply to "any project with respect to which litigation regarding the authority of the Secretary to use comparability studies * * * has resulted in a judgment before the effective date of [the Reform] Act that is final and not appealable." § 801(a)(2)(B), 103 Stat. 2058. The constitutionality of Section 801 is therefore not called into question by this Court's decision in *Plaut*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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